Paulus Enterprises, Inc. d/b/a The Ford Store San Leandro *and* East Bay Automotive Council (Machinists Local Lodge No. 1546, District Lodge No. 190; Painters Local 1176; Teamsters Local 78) Case 32–CA–22464–1

January 29, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

On September 12, 2006, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by unilaterally withdrawing from and failing and refusing, since December 28, 2005, to make contributions to the Automotive Industries Pension Trust Fund as required by the parties' 2000–2005 collective-bargaining agreement, as extended, we shall order the Respondent to make all required contributions that have not been made since that date, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 6 (1979).[4] The Respondent shall also reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Paulus Enterprises, Inc., d/b/a The Ford Store San Leandro, San Leandro, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with East Bay Automotive Council (Machinists Local Lodge No. 1546, District Lodge No. 190; Painters Local 1176; Teamsters Local 78) (the Union) as the exclusive collective-bargaining representative of its employees in an appropriate bargaining unit by unilaterally withdrawing from and ceasing to make contributions to the Automotive Industries Pension Trust Fund (the pension plan) as required by the 2000–2005 collective-bargaining agreement, as extended.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[1] We find that the judge properly denied the Respondent's motion to reopen the record to permit the introduction of evidence concerning the Respondent's prospective pension plan withdrawal liability for 2006. The motion involves evidence of events occurring after the close of the hearing. Furthermore, we find that the evidence would not require a different result in this case. See *Pacific Bell*, 330 NLRB 271 fn. 1 (1999); *Modern Drop Forge Co.*, 326 NLRB 1335 fn. 1 (1998).

[2] Chairman Battista agrees that the Respondent failed to establish economic exigencies excusing its unilateral cessation of pension plan contributions. However, Chairman Battista bases this conclusion on the fact that the Respondent did not promptly tell the Union of its decision to sell the business and of its desire to withdraw from the pension plan by the end of 2005, thereby avoiding liability for 2006. If the Respondent had done so, there would have been ample opportunity to negotiate concerning the Respondent's intentions. Rather than following this course, the Respondent waited until November 29 to tell the Union of its intentions. In these circumstances, Chairman Battista need not reach the issue of whether the Respondent would have been privileged to withdraw from the pension plan at the end of 2005 if it had given timely notice and had reached impasse on that matter before the end of 2005.

For the same reason, Chairman Battista sees no need to reopen the record to receive evidence as to the prospective liability for 2006. For, even if the liability is substantial, the Respondent could have avoided the problem, as discussed above.

[3] We have modified the judge's remedy and the Order to conform to the Board's usual provisions for violations of the type found herein.

The judge found, and we agree, that the Respondent violated Sec. 8(a)(5) by unilaterally withdrawing from and ceasing to make contributions to the Automotive Industries Pension Trust Fund. There is neither allegation nor finding, however, that the Respondent withdrew recognition from the Union. Thus, the judge's general affirmative bargaining order in par. 2(a) of his recommended Order is not necessary to remedy the Respondent's unlawful unilateral change. We shall modify the judge's recommended Order accordingly. See, e.g., *Mimbres Memorial Hospital*, 337 NLRB 998 fn. 2 (2002).

[4] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful unilateral cessation of participation in and contributions to the pension plan.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All employees performing work described in and covered by "Article II. Recognition and Bargaining Agent" of the May 3, 2000 through May 2, 2005 collective-bargaining agreement between the Union and the Respondent excluding all other employees, guards, and supervisors as defined in the Act.

(c) Make all required contributions to the pension plan that have not been made since December 28, 2005, and reimburse unit employees for any expenses ensuing from its failure to make the required contributions, with interest, in the manner set forth in the amended remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in San Leandro, California, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 29, 2007

Robert J. Battista ,	Chairman
Wilma B. Liebman,	Member
Peter N. Kirsanow,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with East Bay Automotive Council (Machinists Local Lodge No. 1546, District Lodge No. 190; Painters Local 1176; Teamsters Local 78) (the Union) as the exclusive collective-bargaining representative of our employees by unilaterally withdrawing from and ceasing to make contributions to the Automotive Industries Pension Trust Fund (the pension plan) as required by the 2000-2005 collective-bargaining agreement, as extended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them in the words above.

WE WILL rescind our unlawful unilateral cessation of participation in and contributions to the pension plan.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All employees performing work described in and covered by "Article II. Recognition and Bargaining Agent" of the May 3, 2000 through May 2, 2005 collective-bargaining agreement between the Union and the Respondent excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL make all required contributions to the pension plan that have not been made since December 28, 2005, and reimburse our employees for any expenses ensuing from our failure to make the required contributions, with interest.

PAULUS ENTERPRISES, INC. D/B/A THE FORD STORE SAN LEANDRO

Jennifer E. Benesis, Esq., for the General Counsel.
John D. McLachlan, Esq. and *Timothy J. Murphy, Esq. (Fisher & Phillips)*, of Oakland, California, for the Respondent.
David Rosenfeld, Esq. (Weinberg, Roger & Rosenfeld) of Alameda, Califronia, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California on June 5 and 6, 2006. On January 27, 2006, East Bay Automotive Council (Machinists Local Lodge No. 1546, District Lodge No. 190; Painters Local 1176: and Teamsters Local 78), (the Union) filed the charge in Case 32–CA–22464–1 alleging that Paulus Enterprises, Inc., d/b/a The Ford Store San Leandro (the Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On March 31, 2006, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California corporation, with an office and principal place of business in San Leandro, California, where it has been engaged in the retail sale and service of automobiles. In the 12 months prior to issuance of the complaint, Respondent, in conducting its business operations, derived gross revenues in excess of $500,000. Further, Respondent received goods and services valued in excess of $5000 directly from points outside the State of California. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

East Bay Automotive Council (the Union) consists of three unions: East Bay Automotive Machinists Lodge No. 1546 (the Machinists), Auto Marine and Specialty Painters Union, Local No. 1176 (the Painters) and Teamsters Automotive Employees Union Local No. 78 (the Teamsters). The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent operates a Ford automobile dealership in San Leandro, California. Since at least May 2000, the Union has represented the machinists and teamsters employed by Respondent.[2] The last collective-bargaining agreement between the parties was effective by its terms from May 3, 2000 through May 2, 2005. Commencing on or about February 16, 2005, the parties began negotiations for the purpose of negotiating a new collective-bargaining agreement to succeed the agreement set to expire on May 2, 2005. On May 17, 2005, the Union and Respondent entered into a written extension agreement, which provided, inter alia, that the 2000-2005 collective-bargaining agreement remain in effect pending negotiations for a successor agreement. By the terms of the written extension, either party could terminate the extension by 15 days written notice to the other party.

On December 5, 2005, Respondent notified the Union that it was terminating the extension agreement effective December 21, 2005. On December 28, Respondent ceased making pension fund contributions required by the 2000–2005 collective-bargaining agreement and the May 17 extension agreement.

Within this factual framework, the General Counsel alleges that Respondent unlawfully terminated its participation in the pension trust fund in the absence of a lawful bargaining impasse. Respondent admits that the parties were not at overall impasse but contends that the parties were at impasse on the issue of pension contributions and that exigent circumstances permitted this unilateral change. Further, Respondent contends that the Union waived its right to bargain over pension contributions "by failing to bargain in a timely manner."

A. The Facts

The Union represents the mechanics and apprentices, service writers, parts employees, installers, detailers, drivers, and lot

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Co*., 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

[2] Respondent no longer employs any painters.

personnel at Respondent's Ford automobile dealership in San Leandro, California. As stated above, the Union and Respondent were parties to a collective-bargaining agreement effective by its terms from May 3, 2000 to May 2, 2005.

The 2000–2005 agreement included a pension provision in which Respondent agreed to participate in the Automotive Industries Pension Trust Fund (the pension plan) and to contribute $465.97 per month/per employee for journeymen mechanics, service writers and parts employees and $233 per month/per employee for installers, stockroom employees, detailers, drivers, and lot personnel. Respondent participated in the pension plan until it unilaterally terminated its participation on December 28, 2005, the conduct at issue herein.

As stated above, the Union and Respondent began negotiations for a successor bargaining agreement in February 2005. The Union's chief negotiator was Craig Andrews of the Machinists. Respondent was represented by Tim Paulus, Respondent's owner, and John McLachlan its attorney. At this first bargaining session, the Union made a proposal which included an increase in the monthly contributions to the pension plan. There was no mention of Respondent withdrawing from the pension plan at this meeting.

In the spring of 2005, Paulus learned that the pension plan had unfunded liability. Unfunded liability exists when a pension fund has less money than would be needed to pay all participants if all participants were currently collecting their pensions. The amount of unfunded liability is based on the amount of current contributions, combined with an actuarial determination of how much the pension plan will earn on investments. Employer-participants in the pension plan may be obligated to pay their share of the unfunded liability, called withdrawal liability, if they leave the pension plan while the unfunded liability exists. Usually this occurs when an employer goes out of business or sells its business.

On April 1, 2005, Respondent made a written request to the pension plan for an estimate of its withdrawal liability. Respondent received an answer from the trust fund that an estimate for its withdrawal liability for 2005 was not yet available. Respondent's estimated withdrawal liability for 2004 would have been in excess of $250,000. On April 7 Paulus complained to Andrews that it was unfair that Respondent had made all its monthly pension contributions but still faced substantial withdrawal liability.

On April 19, Respondent presented collective-bargaining proposals to the Union. However, Respondent did not make a proposal on the pension plan. Respondent sought information about its unfunded liability. The Union responded that the information was not yet available and would probably not be available until the following month.

The parties met again on April 25, May 17, and June 30. At each of these sessions, Paulus complained about the withdrawal liability. However, Respondent did not want to negotiate over the pension plan as it did not yet have the requested information pertaining to its withdrawal liability for 2005. Andrews explained that Respondent would not have withdrawal liability unless it sold or closed its dealership. However, Paulus was not satisfied with this explanation and continued to take the position that he needed to know the estimated withdrawal liability.

At the June 30 session, Andrews showed Paulus and McLachlan a letter from the pension plan manager estimating Respondent's withdrawal liability for 2005 to be in excess of $725,000. Respondent received a letter from the pension manager on July 18 showing the same estimated withdrawal liability.

In August, Paulus attended a meeting held by the pension plan managers for participating employers. At this meeting, the employers were told that the plan estimated that unfunded liability would decrease in 2007 and, if everything went well, unfunded liability could be eliminated by 2010 or 2011.

On October 17, Respondent proposed pension contributions of $25 per month per employee. The purpose of this proposal was to minimize Respondent's contributions to the pension plan without triggering withdrawal liability. The Union made no counterproposal to this offer and the parties did not engage in serious negotiations over this proposal.

On November 29, the parties spent most of their time discussing health and welfare and wages. There was some mention of whether Paulus intended to sell the dealership. Andrews asked whether Respondent intended to sell the dealership. Respondent stated that the dealership was not for sale yet. At the end of this session, Respondent announced its proposal to withdraw from the pension plan. Respondent pointed out that its withdrawal liability had risen from $250,000 to $725,000 and that it anticipated that its withdrawal liability would be in excess of $1 million if it did not withdraw from the pension plan prior to January 1, 2006.

In a letter dated December 5, McLachlan wrote Andrews that Respondent intended to cease further pension contributions to the pension plan and to withdraw from participation in the plan effective December 28, 2005. McLachlan explained that Respondent expected its withdrawal liability to increase approximately $500,000 over the already existing withdrawal liability of over $725,000. McLachlan offered to bargain over retirement/pension benefits as well as all other terms and conditions of employment.

On December 19, Andrews was not available and Mike Cook of the Machinists was the Union's chief spokesman. The Union arranged for Fred Herberich, an actuary for the pension plan to be present to answer any questions about the pension plan. Herberich stated the fund was not performing as well as he expected in August and estimated that the unfunded liability could extend to 2015. Cook asked if Paulus intended to sell the dealership. Paulus answered that he wanted "to be able to sell it."[3] Cook presented a proposal where Respondent's monthly pension contributions would be split with a certain amount going into the pension plan and the remainder being used to pay down the Respondent's withdrawal liability. Cook did not propose specific amounts but merely tried to discuss this concept. McLachlan raised questions about whether the plan trustees would allow this arrangement and whether the arrangement was lawful. McLachlan stated that the parties were at impasse and that Respondent would cease participation

[3] Unbeknownst to the Union, Paulus had already begun the process of selling his dealership to the Ford Motor Company Dealer Development group.

in the pension plan as of December 28. The parties stipulated that Respondent ceased making contributions to the pension plan after December 28, 2005.

B. Respondent's Defense

Respondent contends that Paulus intended to sell the business and, therefore, needed to minimize the withdrawal liability because any sale of the business would be substantially diminished by the increase in the unfunded liability unless Respondent withdrew from the pension plan.

On December 6, 2005, Paulus spoke with Patrick Sheehan of the Ford Motor Company Development group. Paulus and Sheehan then met on December 8 to discuss Paulus' desire to seek aide in selling the dealership. Sheehan informed Paulus of the process required by Ford Development. On December 15, Paulus sent Sheehan the required documents to start the process whereby Ford Development would help Paulus find a buyer for the dealership.[4] The parties stipulated that Paulus engaged in additional discussions in January 2006 and continuing to the date of the hearing, concerning the sale of the dealership to Ford Dealer Development and other individuals.

Respondent further contends that "the Union's dilatory bargaining tactics justified Respondent's unilateral action and constitute waiver of the Union's right to bargain." On November 3, Andrews notified McLachlan that he was unavailable for the scheduled November 8 meeting. Respondent requested that Andrews reserve November 28, 29, 30 and December 1, 2,5,7,8, and 9. On November 21, Andrews notified Respondent that he was only available on November 29. Andrews proposed additional dates of December 12 and 13 but these dates were not available for Respondent. The Union was not available for other dates in November or December. As noted above, the parties then met on November 29. By letters dated December 5 and 8, McLachlan sought further bargaining in December. As indicted above, the parties were unable to meet again until December 19.

III. ANALYSIS AND CONCLUSIONS

A. The Respondent Was Obligated to Bargain

The general rule is that when parties are engaged in negotiations for a new agreement an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole. *Pleasantview Nursing Home,* 335 NLRB 96 (2001)*;* citing *Bottom Line Enterprises*, 302 NLRB 373 (1991). In *Bottom Line Enterprise,* the Board recognized only two exceptions to that general rule: when a union engages in bargaining delay tactics and "when economic exigencies compel prompt action 335 NLRB at 374.

The Board has limited the economic considerations which would trigger the *Bottom Line* exception to "extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action." *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995). In *RBE Electronics*, 320 NLRB 80, 81 (1995) the Board made it clear that "[a]bsent a dire financial emergency, economic events such as . . . operation at a competitive disadvantage . . . do not justify unilateral action." citing *Triple A Fire Protection*, 315 NLRB 409, 414 (1994).

However, in *RBE Electronics*, the Board also found that there may be other economic exigencies that, although not sufficiently compelling to excuse bargaining altogether, should be encompassed within the exigency exception. In those cases, the employer will "satisfy its statutory obligation by providing [the union] with adequate notice and an opportunity to bargain over the changes it proposes to respond to the exigency and by bargaining to impasse over the particular matter. In such time sensitive circumstances, however, bargaining, to be in good faith, need not be protracted." *Pleasantview Nursing Home*, supra, citing *RBE Electronics* and Naperville *Ready Mix, Inc.*, 329 NLRB 174, 182–184 (1999).

In *Pleasantview Nursing Home* the Board reiterated that the exception will be limited only to those exigencies in which time is of the essence and which demand prompt action. Thus, the Board will require an employer to show a need that the particular action proposed be implemented promptly. Consistent with the requirement that an employer prove that its proposed changes were "compelled," the employer must also show that the exigency was caused by external events, was beyond its control, or was not reasonably foreseeable. Id.

Applying these principles here, it is clear that the Respondent's claimed exigency is not the type of "extraordinary event" that justifies unilateral action without bargaining. Although Respondent would be obligated to pay withdrawal liability due to a sale or closure of its business, neither action was imminent. Further neither situation was beyond the Respondent's control. Furthermore, withdrawal liability was not unforeseeable. Paulus raised the issue of withdrawal liability as early as April 1. There was no reason why Respondent could not give the Union notice and an opportunity to bargain over its proposal to withdraw from the pension plan and the effects of such a withdrawal.

The next question is whether Respondent's claimed exigency is of the less compelling type defined by *RBE Electronics*, i.e., whether the employer would be entitled to take unilateral action if bargaining over the particular matter resulted in impasse. While the Respondent has shown that its withdrawal liability had increased and that it had a good-faith belief that its withdrawal liability would significantly increase if it continued to be bound to the pension plan, it has failed to show that "time was of the essence" and that "prompt action" was "compelled" independent of the overall ongoing bargaining process. The evidence here simply does not demonstrate that the exigency was caused by external events, was beyond Respondent's control, or was not reasonably foreseeable. I find that this case does not present the sort of emergency that *RBE Electronics* contemplates.

Even if it did, however, I find that the Respondent has not met its residual duty to bargain in good faith under the circumstances here. The Respondent did not notify the Union that it

[4] Under Ford Development's procedures, Ford Development would find a qualified buyer for the dealership, purchase the dealership from Respondent and then sell the dealership to the buyer. Ford Development would finance this resale.

intended to sell the business. It simply stated that it wanted to be able to sell the dealership. Respondent did not provide the Union with adequate notice and opportunity to bargain over its declaration that it was withdrawing from the pension plan. Nor did Respondent seek to bargain over the effects of withdrawal from the pension plan. Good-faith bargaining would have entailed informing the Union, in advance, that the Respondent believed that an emergency existed and that it intended to unilaterally implement a proposal to address the situation, if impasse were reached. Last, there is no basis for concluding that impasse had been reached on November 29 over withdrawal from the pension plan. While the parties had been negotiating for over 9 months, it was not until the end of the November 29 session that Respondent declared that it was withdrawing from the pension plan. Respondent made no additional proposal regarding retirement at that time. While the Union attempted to negotiate regarding the pension plan on December 19, Respondent stated that there was insufficient time and that it was withdrawing from the pension plan.

In the instant case the parties met in numerous sessions from February until December 19, 2005. However, the parties only discussed Respondent's proposed withdrawal from the pension plan briefly on November 28 and again on December 19. Both of these sessions were short and there was no discussion concerning a substitute retirement plan or the effects of Respondent's withdrawal from the pension plan.

Respondent argues that there was no prospect of an agreement and that the Union was never going to agree to a collective-bargaining agreement without the pension plan. Respondent's declaration of impasse preempted bargaining. While Respondent argued in November and December 2005, and again at the instant hearing that the parties were at impasse on the issue of the pension plan, "both parties must believe they are at the end of their rope." *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1177 (5th Cir. 1982). See also *NLRB v. Powell Electrical Mfg.*, 906 F.2d 1007, 1011–1012 (5th Cir. 1990). In *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), the Board concluded that the parties had not yet reached a legal impasse even though the employer asserted that it had reached its final position, as during the final session, the charging party-union "not only continued to declare its intention to be flexible, but demonstrated this throughout its dealings with the Respondent that day." The Board stated:

> Where as here, a party who has already made significant concessions indicates a willingness to compromise further, it would be both erroneous as a matter of law and unwise as a matter of policy for the Board to find impasse merely because the party is unwilling to capitulate immediately and settle on the other party's unchanged terms. . . . Further, even assuming arguendo that the Respondent has demonstrated it was unwilling to compromise any further, we find that it has fallen short of demonstrating that the Union was unwilling to do so. [Id. At 586.]

In this case, the Union argued that the parties were not at impasse. It is not sufficient for a finding of impasse to simply show that the Employer had lost patience with the Union. Impasse requires a deadlock. As the Board stated in *Powell Electrical Mfg.* Co., 287 NLRB 969, 973 (1987):

> That there was no impasse when the Company declared is not to suggest that if the parties continued their sluggish bargaining indefinitely there would have been agreement on a new contract. Such a finding is not needed, nor could it be made without extra-record speculation, to find on this record that when the Company declared an impasse there was not one, even as far apart as the parties were. They had most of their work ahead of them, and judging by the opening sessions clearly had different goals in mind for a contract. Whether their differences ever would have been resolved cannot be known; but that is the nature of the process. It is for the parties through earnest, strenuous, tedious, frustrating and hard bargaining to solve their mutual problem—getting a contract—together, not to quit the table and take a separate path.

As stated above, the fact that Respondent believed that the Union would never agree to Respondent's retirement proposals does not establish an impasse. In light of the limited bargaining about withdrawal from the pension plan and the Union's willingness to continue bargaining, I cannot find the parties had reached a deadlock regarding this issue. As stated earlier, Respondent concedes that there was not an overall impasse in bargaining.

B. The Union Did Not Delay Bargaining

As stated earlier, Respondent argues that the Union waived its right to bargain over pension contributions by failing to bargain in a timely fashion. The facts do not support this argument. The parties bargained from February until December. There is no evidence that the Union caused delay in the negotiations or attempted to delay negotiations. Unfunded liability was a concern for Respondent throughout negotiations but Respondent did not give notice of its intent to withdraw from the pension plan until the end of the November 29 meeting. While the Union did not meet on all the dates proposed by Respondent, the Union did propose alternate dates. The evidence does not establish that the Union continually avoided or delayed bargaining as contemplated by *RBE Electronics*.

As I have found that on December 28, 2005, no lawful impasse existed, Respondent's implementation of the terms of its final offer that day, without the agreement of the Union, was violative of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing to make contributions to the pension plan on December 28, 2005.

4. Respondent's conduct above is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act. Accordingly, I shall order Respondent to make whole the pension plan for all contributions that would have been paid but for Respondent's unlawful discontinuance of payments. Respondent must make payments to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Paulus Enterprise, Inc., d/b/a The Ford Store San Leandro, San Leandro, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively by unilaterally implementing its withdrawal from Automotive Industries Pension Fund on December 28, 2005.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate bargaining unit described below with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All employees performing work described in and covered by "Article II. Recognition and Bargaining Agent" of the May 3, 2000 through May 2, 2005 collective-bargaining agreement between the Union and Respondent (herein called the Agreement) excluding all other employees, guards, and supervisors as defined in the Act.

(b) On request by the Union, rescind any unilateral changes it has implemented in its employees' terms and conditions of employment.

(c) If requested by the Union, resume participation in and contributions to the pension plan to which Respondent stopped contributions effective December 28, 2005.

(d) Make whole the pension plan, in the manner set forth in the remedy section of the decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in San Leandro, California copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 2005.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 32, a sworn certification of a responsible official on a form provided by Region 32 attesting to the steps the Respondent has taken to comply herewith.

Dated, Washington, D.C., September 12, 2006

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain collectively by unilaterally withdrawing from the Automotive Industries Pension Plan

WE WILL NOT refuse to meet and bargain with the Union as the exclusive collective-bargaining representative of our employees in the appropriate bargaining unit with respect to rates of pay, hours of employment, and other terms and conditions of employment including contributions to the pension plan.

WE WILL NOT in any like or related manner interfer with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate bargaining unit described below with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All employees performing work described in and covered by "Article II. Recognition and Bargaining Agent" of the May 3, 2000 through May 2, 2005 collective-bargaining agreement between the Union and Respondent (herein called the Agreement) excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL on request by the Union, rescind any unilateral changes we have implemented in our employees' terms and conditions of employment.

WE WILL, on your behalf, make whole the pension plan, with interest.

PAULUS ENTERPRISES, INC. D/B/A THE FORD STORE SAN LEANDRO